

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 62 of 2002.

Judgement reserved on: 29.5.2007

Date of decision: 3.7.2007.

Nagender Sharma and ors.	 Appellants.
Vs.	
Vidya Sagar and ors.	 Respondents.

Coram

The Hon'ble Mr. Justice Kuldeep Singh, Judge.

Whether approved for reporting?

For the Appellants : Mr. K.D.Sood, Advocate with Mr. B.K.Sood, Advocate.

For the Respondents : Mr. R.K. Bawa, Sr. Advocate with Mr. M.S.Thakur, Advocate.

Kuldeep Singh, Judge.

The appellants are the sons, daughter and widow of original plaintiff Dev and have assailed judgement, decree dated 5.12.2001, passed by the learned District Judge, Mandi, in Civil Appeal No. 14 of 1998, confirming the judgement and decree, dated 24.10.1997, passed by Senior Sub Judge, Mandi, in Civil Suit No. 36 of 1991. The parties are referred in the same manner, as in the trial court.

2. The facts, as emerge from the plaint, are that plaintiff filed a suit for declaration against defendants claiming ownership and possession of the land, comprised in khasra Nos. 719/2 and 719/3, situate in Mohalla Tarna, Mandi Town, District Mandi, H.P. and he

Whether the reporters of the local papers may be allowed to see the Judgment?

has right of path and discharge of water through the aforesaid khasra numbers and sought permanent prohibitory injunction against the defendants on the allegations that he is exclusive owner in possession of land, comprised in khasra Nos. 720/2 and 720/3, measuring 221.32 Sq. meters, situate in Tarna Mohalla Mandi town, Mandi, H.P.

3. The plaintiff has constructed a pucca residential house on khasra Nos. 720/3 and also on a part of khasra No. 704 more than 22 years ago. He is in possession of suit land, comprised in khasra Nos. 719/2 and 719/3, measuring 280.75 Sq. meters, for the last more than 40 years continuously and he has acquired title thereto by way of adverse possession. The entries of defendants, as owner in possession of the suit land, are wrong and illegal. The house of plaintiff is situate at higher level than the suit land. The plaintiff has got right of lateral support to his house from the suit land. The plaintiff is also discharging the water of his house through khasra No. 719/2, for the last more than 22 years, as a matter of right. There is approach to the residential house of the plaintiff through the boundary of khasra Nos. 719 and 704.

4. The defendants started digging khasra No. 719/2 illegally with the intention of raising construction thereon. The digging by the defendants has threatened the residential house of the plaintiff, as it has caused danger to the house of the plaintiff. The defendants have exposed the foundation and water outlet pipes of the house of the plaintiff, which can collapse at any time. The digging has also caused danger to the path of the plaintiff. The defendants were

requested not to raise any construction on the suit land, but to no avail, and, therefore, plaintiff filed the suit.

5. The defendants contested the suit and have submitted that plaintiff is not owner of the land, comprised in khasra Nos. 720/2 and 720/3. The plaintiff was in wrongful possession of the aforesaid land. The plaintiff has not acquired right, title on the suit land by way of adverse possession. The entries in the record are correct. The suit land was earlier owned by State of Himachal Pradesh and was in wrongful possession of Dhandev, the predecessor in interest of the defendants. The State of Himachal Pradesh conferred proprietary rights on him. The plaintiff never discharged the water of his house through the suit land nor the plaintiff has right of lateral support to his house from the suit land. The plaintiff has constructed his house on khasra No.704 about twenty years back and house on khasra No. 720/3 was constructed about three years ago, despite objections of the defendants. The plaintiff has no right to restrain the defendants from raising construction on the suit land. There is no danger to the house of the plaintiff by the construction, nor water pipes of the plaintiff were in the suit land. The construction of the defendants has no connection with the path of the plaintiff nor there is any danger to the path by the construction.

6. The trial court held that plaintiff is exclusive owner in possession of land, comprised in khasra Nos. 720/2 and 720/3, but plaintiff is not in adverse possession of khasra Nos. 719/2 and 719/3, measuring 280.75 Sq. meters. It has been held that plaintiff has no natural lateral support to his house from khasra No. 719, nor he has

right of path and right to discharge water in khasra No. 719. The trial court, dismissed the suit, on 24.10.1997. The original plaintiff had filed appeal against the decision, dated 24.10.1997, during the pendency of the appeal the plaintiff died and his legal representatives were brought on record. In the first appellate court, an application, under Order 6, Rule 17 of the Code of Civil Procedure, was filed for amendment of the plaint. The appeal and the application were dismissed by the learned District Judge, on 5.12.2001. The legal representatives of original plaintiff are thus in appeal in this court against the impugned judgement and decree.

7. The appeal was admitted on following substantial questions of law:-

1. Whether the findings of the courts below are perverse and based on misreading of oral and documentary evidence particularly Ext. DB mutation, documents Ext. PR, PR-1/A, P 2, PW 6/A, PW 6/B, site plan Ext. DA and the statement of PW 2 Mohinder Singh and also pleadings of the parties.
2. Whether in view of the fact that the house of the plaintiffs was situated on a higher level than khasra numbers 719 and 720 and the defendants have right to raise construction over the suit land which was at a lower level and which would endanger the safety of the house which had lateral support for the same.
3. Whether the District Judge erred in law in rejecting the application for amendment of the plaint on the ground that the same was moved at a belated stage

when in fact it was necessary for determining the controversy between the parties and the findings on that account are vitiated besides being perverse.

8. I have heard the learned counsel for the parties and have also gone through the record.

9. The learned counsel for the legal-representatives of original plaintiff has submitted that the courts below have misread the pleadings, statement of PW 2 Mohinder Singh and other oral and documentary evidence, on record. The construction of defendants would endanger the safety of the house of the legal representatives of the plaintiff. The District Judge, has erred in dismissing the amendment application filed for amendment of the plaint. The learned counsel for the defendants has submitted that no substantial question of law is involved in the appeal and has supported the impugned judgement and decree.

Substantial question of law No. 3.

10. In the application, under Order 6, Rule 17 of the Code of Civil Procedure, filed before the learned District Judge, it was alleged that defendants have not obtained sanction from Municipal Council, Mandi, for raising construction and even if they have obtained such permission, they are required to raise construction in accordance with approved plan. The defendants filed reply to the application and have submitted that plan has been approved by the Municipal Council, Mandi. The amendment will change the nature of cause of action and open the case as a whole. The amendment is not necessary in order to determine the real controversy between the parties. They have

also filed copy of sanction letter, dated 14.9.1999, alongwith copy of plan of their house.

11. The application for amendment of the plaint was filed on 2.11.2001, even though the sanction was granted by the Municipal Council, Mandi, for raising construction, on 14.9.1999. The plaint is sought to be amended to direct the defendants to raise construction in accordance with the sanctioned plan, if any approved. The original plaintiff in the plaint has made prayer for declaration of ownership by way of adverse possession on khasra Nos. 719/2 and 719/3 with a further prayer of right to discharge water of his house on these khasra numbers and injunction against the defendants not to raise any construction on these khasra numbers. In the amendment application, there is no allegation that defendants are raising construction in violation of the sanctioned plan. The amendment application suffers from the vice of delay and laches. The amendment application, if allowed, will change the nature of the case. The proposed amendment is not required to determine the real controversy between the parties. The lower appellate court has considered the amendment application rightly and the finding on the amendment application returned by the lower appellate court does not require any interference by this Court. The substantial question of law No. 3 is decided against the legal representatives of the original plaintiff.

Substantial questions of law No. 1 and 2.

12. The learned counsel for the defendants has submitted that no substantial question of law is involved in the appeal. The two

courts below have concurrently decided the lis against the plaintiff. He has submitted that no doubt the appeal has been admitted on substantial questions of law on 1.3.2002, but the same was admitted without notice to the defendants, hence even at this stage the defendants have a right to make submission that no substantial question of law is involved in the appeal and for this purpose, he has relied **Govindaraju vs. Mariamman** [2005 (2) SCC 500]. In para-12 of the judgement, the Hon'ble Supreme Court has held as follows:-

“Section 100 provides that the second appeal would lie to the High Court from a decree passed in appeal by any court subordinate to the High Court if the High Court is satisfied that the case ‘involves a substantial question of law’. It further provides that the memorandum of appeal shall precisely state the substantial question of law involved in the appeal and the High Court on being satisfied that the substantial question of law is involved in a case formulate the said question. Sub-section (5) provides that the ‘appeal shall be heard on the question so formulated’. It reserves the liberty with the respondent against whom the appeal was admitted ex parte and the questions of law had been framed in his absence to argue that the case did not involve the questions of law framed.....”.

13. The submission of the learned counsel for the defendants is that prayer in the plaint confines to khasra Nos. 719/2 and 719/3. The suit is for declaring the plaintiff as owner in possession of land, comprised in khasra Nos. 719/2 and 719/3, by way of adverse possession and declaring the entries wrong and illegal, which show the defendants as owners in possession of these

khasra numbers. The trial court has specifically recorded a finding that plaintiff has failed to prove that he is in possession of the suit land and he has acquired title by way of adverse possession of the suit land. Similarly, the trial court has returned findings that plaintiff has no right of natural support to his house from the suit land and right of path and discharge of water through the suit land, and therefore, the suit of the plaintiff was dismissed. These findings have been affirmed by the learned District Judge.

14. The two courts below on pure appreciation of facts have concurrently come to the conclusion that plaintiff has failed to make out any case and, therefore, dismissed the suit. The learned counsel for the legal representatives of plaintiff has failed to make out any case how the two courts below have misread pleadings, oral and documentary evidence on record. No specific instance of misreading of pleadings and oral and documentary evidence has been pointed out. No case for interference has been made out. The substantial questions of law No. 1 and 2, are decided against the legal representatives of the original plaintiff and in favour of the defendants.

15. The result of the above discussion is the appeal is dismissed with costs.

July 3, 2007.
(Hem)

(Kuldip Singh),
Judge.